



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1994

Mr. Burton F. Raiford
Commissioner
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-597

Dear Mr. Raiford:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27446.

The Texas Department of Human Services ("the department") received a request for "copies of all medical records, photographs, and/or statements on the above referenced patient [at a nursing facility] arising from injuries she received on or about April 21, 1994." The request was accompanied by a medical authorization signed by the legal representative of the injured patient and authorizing the release of certain information to the requestor. The information you enclosed as responsive to this request you characterize as "backup documents to the completed investigation report." These documents include the following: Report of Contact for RGN, Statement of Deficiencies and Plan of Correction, Resident Sample, Complaint Intake and Authorization for Investigation, Investigation Report, Photograph Index, an authorization for the department to photograph a resident, and copies of photographs.

Section 552.101 of the Government Code excepts from required public disclosure information considered confidential by law, including statutory law. You raise section 242.127 of the Health and Safety Code and section 90.216(a) of title 40 of the Texas Administrative Code. Section 242.127 provides that:

A report, record, or working paper used or developed in an investigation made under this subchapter is confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency.

This provision, in conjunction with section 552.101 of the Government Code, protects from required public disclosure the department's reports, records, and working papers used or developed in an investigation of abuse or neglect. Attorney General Opinion JM-1048 (1989) at 5 (construing predecessor statute, V.T.C.S. art. 4442c, § 16(h), *repealed* by Acts 1989, 71st Leg., ch. 678, § 13(1), at 3165).

In accordance with section 242.127, the department adopted section 90.216(a) of title 40 of the Texas Administrative Code, which applies to investigations of complaints of abuse, neglect, and exploitation at nursing facilities and related institutions. Section 90.216(a) provides as follows:

(a) Confidentiality. All reports, records, and working papers used or developed by the Texas Department of Human Services ("department") in an investigation are confidential, and may be released to the public only as provided below.

(1) Completed written investigation reports are open to the public, provided the report is deidentified. The process of deidentification means removing all names and other personally identifiable data, including any information from witnesses and others furnished to the department as part of the investigation.

(2) The reporter and the facility will be notified of the results of the department's investigation of a reported case of abuse or neglect, whether the department concluded that abuse or neglect occurred or did not occur.

Section 90.216(a), like section 242.127 of the Health and Safety Code, provides confidentiality for a "report, record, or working paper used or developed in an investigation" of a nursing facility regarding a complaint of abuse, neglect, and exploitation. "A report, record, or working paper used or developed in an investigation" refers to information that relates to the investigation, that is, information that was used by the investigator in conducting the investigation and completing the investigation report. We conclude that the backup documents to the investigation report are "report[s], record[s], or working paper[s] used or developed in the investigation." Thus, such information is confidential by law and therefore, excepted from required public disclosure under section 552.101 of the Government Code.

This is so even though in this case, the legal representatives of the subject of the complaints have signed an authorization for the release of information.¹ Health and

¹We note that the authorization does not authorize the release of information by the department. The authorization states, "I hereby authorize any and all physicians, surgeons, and doctors who have examined, treated or x-rayed Faye B. Whatley, and all hospitals in which she has ever been a patient, to

Safety Code section 242.126, in conjunction with the department's rules, controls access to the attachments to the investigation report. Section 242.126 and the department rules do not give the subject of the complaints or the subject's representative a right to see the attachments, or the department the authority to make the attachments available. Cf. Open Records Decision No. 507 (1988) (concluding that section 10(d) of V.T.C.S. art. 4447u does not provide for release to patient of information concerning patient in records of an investigation of a complaint about a home health agency).

On the other hand, by department rule, the investigation report is open to the public. 40 T.A.C. § 90.216(a)(1). The rule requires the report to be "deidentified" when released, which means "removing all names and other personally identifiable data, including any information from witnesses and others furnished to the department as part of the investigation." *See id.*²

We also note that section 552.023 of the Government Code does not grant access to the investigation reports without deidentification or to the reports' attachments. Section 552.023 states in pertinent part as follows:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to records and copies of records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

(Footnote continued)

furnish the law firm of Paul Wendell Enlow and Associates, or the bearer hereof, all records, x-rays, laboratory reports, and other data or information and medical history, treatment or diagnosis, past, present and future, and permit them to examine such . . . information, and hereby authorize you to permit them to make copies thereof, . . ."

²We note that section 483.10 of title 42 of the Code of Federal Regulations, which applies to an institution that participates as a skilled nursing facility in the Medicare Program and a nursing facility in the Medicaid Program, requires a nursing facility to protect the rights of each resident. Under section 483.10(b)(2), a resident or a resident's legal representative has a right to access all records pertaining to the resident, including current clinical records within 24 hours of requesting those records (excluding weekends and holidays), and a right to purchase copies of such records.

Section 552.023 grants access to an individual or to an individual's representative when information is excepted from required public disclosure based on a law that protects that individual's privacy interests. *See* Open Records Decision No. 587 (1991). Thus, section 552.023 is not applicable to a confidentiality provision that protects more than privacy interests. *See id.*

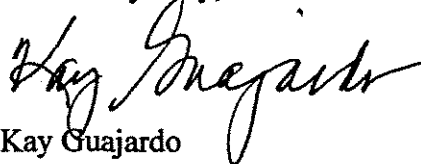
For example, section 142.009(d) of the Health and Safety Code provides confidentiality for the reports, records, and working papers developed in an investigation of home health services agencies made by the Texas Department of Health under chapter 142 of the Health and Safety Code. Because section 142.009(d) was designed to protect the integrity of the investigatory process of the Texas Department of Health, and not solely the privacy interests of individuals, an individual may not invoke section 552.023 to gain access to records made confidential under section 142.009(d) of the Health and Safety Code. *See* Open Records Decision No. 603 (1992).

Similarly, we think section 242.127 of the Health and Safety Code in conjunction with section 90.216 of title 40 of the Texas Administrative Code protects more than the privacy interests of the individuals involved; it also protects the department's investigatory process. In particular, we note the need to protect witnesses from retaliation. Moreover, like the confidentiality provision in Open Records Decision No. 603, section 242.127 of the Health and Safety Code and section 90.216 of title 40 of the Texas Administrative Code do not provide for the release of information to individuals who give written consent to the release of information concerning themselves.

We, therefore, conclude that section 552.023 does not permit the authorized representative to gain access to information made confidential by section 242.127 of the Health and Safety Code in conjunction with section 90.216 of title 40 of the Texas Administrative Code. *See id.*; *cf* Open Records Decision No. 577 (1990) at 4 (finding statutory predecessor to section 552.023, Government Code, applicable to certain information where section 81.046 of Health and Safety Code provided exception to confidentiality when person identified in information consents).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 27446

Enclosures: Submitted documents

cc: Mr. Paul Wendell Enlow
Paul Enlow & Associates
3519 Jim Wright Freeway
Fort Worth, Texas 76106
(w/o enclosures)